

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA M. NAWRACAJ and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 02-810; Submitted on the Record;
Issued August 18, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for an employment-related emotional condition.

Appellant, then a 38-year-old supervisor, filed a claim alleging that she developed depression due to allegations of physical assault arising out of a February 13, 1997 incident. The plant manager, Mr. Bush, investigated the incident and found insufficient evidence to support that a physical assault had occurred. The Office accepted that on February 13, 1997 appellant was involved in a verbal altercation with a subordinate, Darlene Hodges, and another supervisor, Michael Aiello. She claimed that she put her foot and hand on the door to prevent Ms. Hodges from opening it to leave, and she denied any physical contact. However, Ms. Hodges and Mr. Aiello alleged that a physical assault occurred. The Office accepted appellant's claim for depression. It determined that, since the employing establishment found that there was no evidence that appellant assaulted Ms. Hodges, the allegations of Ms. Hodges and Mr. Aiello were false and, therefore, constituted a compensable factor of employment.

However, a copy of a September 17, 1998 Office hearing representative decision was submitted to the record which accepted Ms. Hodges's claim for right wrist strain, cervical strain, thoracic strain and shoulder strain, finding that appellant had grabbed Ms. Hodges' wrist on February 13, 1997 and pulled at it, in addition to placing her hand on the door to prevent Ms. Hodges from leaving. The Office claims examiner determined that, since Ms. Hodges' claim was accepted by an Office hearing representative, then the factual findings for accepting appellant's claim must be false.

On October 1, 1999 the Office issued a notice of proposed termination of compensation and medical benefits by rescinding its prior acceptance of appellant's claim. The Office noted that the hearing representative's findings in the *Hodges*' case and found the hearing representative's decision determinative regarding the February 13, 1997 incident.

Appellant objected to the proposed rescission and on October 12 and November 22, 1999 she claimed that Supervisor Aiello was lying, that Marlene Trahan did not see any assault and that a casual female employee had told her that Mr. Aiello had stated that he had lied about the incident. Appellant again objected by letter dated October 18, 1999, which again claimed that Mr. Aiello had told another employee that he had lied.

Appellant provided further statements reiterating that she had not touched Ms. Hodges and a February 18, 1997 statement from Ms. Trahan, a coworker who was in the room at the time of the alleged assault. Ms. Trahan stated that she was working in the room in question on February 13, 1997 and she saw appellant put her palm on the door as she said to Ms. Hodges, “you’re not going anywhere, you’re going to stand here and listen to this.” Ms. Trahan noted that no physical contact took place.

A November 23, 1999 notarized affidavit by Rose Hajec, a coworker, was submitted which stated that, while she and Mr. Aiello were outside smoking cigarettes, Mr. Aiello admitted that he had lied about the February 13, 1997 accident that “[appellant] never touched [Ms. Hodges]” and that appellant “got what she deserved.” Ms. Hajec noted that Mr. Aiello stated, “[Ms. Hodges] and I and know you will never tell.”

A March 9, 2000 affidavit by Mr. Bush, the building manager, was submitted which noted that during an investigation he found conflicting statements from different individuals as to what had occurred on February 13, 1997. During his interview, Mr. Aiello gave conflicting statements about observing appellant strike Ms. Hodges’ hand and, based on the office layout, Mr. Bush was not convinced Mr. Aiello observed appellant strike Ms. Hodges’ hand. Mr. Bush stated that, if appellant had assaulted Ms. Hodges, he would have expected Ms. Hodges to report it to him on that date when she asked to speak with him.¹

By decision dated November 27, 2000, the Office rescinded its acceptance of appellant’s claim, finding that there was no compensable factor of employment in appellant’s case as an Office hearing representative had found that a touching incident did occur as alleged by Ms. Hodges and as supported by Mr. Aiello.

By letter dated December 4, 2000, appellant requested an oral hearing before an Office hearing representative. On January 9, 2001 she requested subpoenas for the appearance at the hearing of Mr. Aiello and Ms. Hodges. The requested subpoenas were issued on May 23, 2001.²

In a May 24, 2001 statement, appellant alleged that Mr. Aiello could not have seen her touch Ms. Hodges’ hand on the doorknob as a three-foot seven-inch counter was between where he sat and the doorknob, which was only three feet four and one half inches high.

A hearing was held on June 28, 2001, at which appellant testified. By decision dated October 19, 2001, the hearing representative affirmed the rescission of acceptance of appellant’s claim, finding that the hearing representative in Ms. Hodges’ case found that the allegations of

¹ Ms. Hodges did not allege that appellant struck her hand until February 15, 1997.

² The Board notes that neither Ms. Hodges nor Mr. Aiello appeared in response to the subpoenas.

Ms. Hodges and Mr. Aiello were in fact true and, therefore, “no longer constitut[ed] factors of employment.” The hearing representative found that the evidence of record was insufficient to establish that Ms. Hodges and Mr. Aiello lied, that Ms. Hajec’s statement was of diminished probative value because it was made two years after the alleged incident and was unreliable because of personal animus toward Mr. Aiello, and that the other statements were vague and conjectural.

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant’s emotional condition claim.

The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴ It is well established that once the Office has accepted a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁵ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁶

While the record contains a final decision of an Office hearing representative pertaining to the claim of Ms. Hodges, finding that appellant grabbed and pulled Ms. Hodges’ wrist and placed her hand on the door, the evidence relied upon by the Office in making this factual determination is not part of the present case record.

In the present case record, there are several statements from witnesses which support appellant’s allegations regarding the February 13, 1997 incident.

The plant manager, Mr. Bush, who was charged with determining what had occurred, found after investigation that there was insufficient evidence to support that Ms. Hodges was physically assaulted by appellant on February 13, 1997. He did find that there were conflicting statements from different individuals as to what had occurred on February 13, 1997 and that during an interview Mr. Aiello gave conflicting statements about observing appellant strike Ms. Hodges’ hand. Mr. Bush stated that, based on the office layout, he was not convinced that Mr. Aiello observed appellant strike Ms. Hodges’ hand and that if a touching incident did occur, he would have expected Ms. Hodges to report it to him on the date it occurred when she asked to see him.

A coworker, Ms. Trahan, who was in the room at the time of the February 13, 1997 incident, provided a February 18, 1997 contemporaneous statement claiming that she saw

³ *James C. Bury*, 54 ECAB ____ Docket No. 03-596 (issued April 24, 2003); *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁵ *See* 20 C.F.R. § 10.610.

⁶ *Alice M. Roberts*, 42 ECAB 747 (1991).

appellant put her palm on the door as she said to Ms. Hodges; “you’re not going anywhere, you’re going to stand here and listen to this.” She noted that no physical contact or assault took place.

Also, Ms. Hajec, another coworker, provided an affidavit on November 23, 1999 stating that Mr. Aiello had admitted that his statements regarding the February 13, 1997 incident were lies. This statement is relevant to and probative on the issue of whether or not Mr. Aiello lied in his statement to the investigator. The time delay factor from the date of the February 13, 1997 incident does not diminish its probative value due to the fact that appellant’s claim was originally accepted and that there was no need for such evidence until the Office advised that it proposed to rescind appellant’s claim and it was timely made with respect to that proposed action. Further, there was no evidence of record that this statement was made by Ms. Hajec on the basis of her personal relationship with Mr. Aiello.

The statement of Ms. Trahan does not support that a physical contact or assault occurred on February 13, 1997. She was in a position to witness the incident and noted that no physical contact was observed. Ms. Trahan stated that she happened to look up at the moment appellant put her hand on the door and she did not witness any physical assault by appellant. The hearing representative in the *Hodges* case noted that Ms. Trahan looked up at the moment when appellant was said to have assaulted Ms. Hodges, without observing any physical contact between them. The evidence of record does not contain any direct, positive testimony or statements contradicting appellant’s version of the February 13, 1997 incident.⁷ Appellant’s allegations of the facts were disbelieved in light of the finding of an Office hearing representative in the *Hodges* case. It is not apparent from the record that any probative value was given to the witnesses’ statements supporting appellant’s claim.

The Board finds that there exists in the case record, substantial evidence in the form of witness statements from Mr. Bush, Ms. Trahan and Ms. Hajec, which supports the original factual finding in this case: that no physical contact or assault took place between appellant and Ms. Hodges on February 13, 1997. This conclusion was bolstered by the fact that neither Ms. Hodges nor Mr. Aiello appeared when subpoenaed for appellant’s hearing.

There is substantial uncontroverted evidence in the case record, in the form of witness statements, supporting appellant’s claim that there was no physical assault involved in the February 13, 1997 incident. The only opposing evidence of record is a copy of a hearing representative’s final decision in another case without any of the supporting evidence relied upon by the hearing representative. The evidence of record is insufficient to meet the Office’s burden of proof to rescind its prior acceptance of appellant’s claim.

⁷ See *Lillard Watts*, 2 ECAB 49 at 50 (1948).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 19, 2001 is hereby reversed.

Dated, Washington, DC
August 18, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member